

MAF Draft 10/22

Mr. Vince Ryan
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002

Re: San Jacinto River Waste Pits Superfund Site

Dear Mr. Ryan:

This is in response to your letter dated September 17, 2015, regarding the San Jacinto River Waste Pits site ("Site"). Your letter identifies several concerns regarding the Site remedial investigation/feasibility study ("RI/FS") which I will attempt to address.

The potentially responsible parties ("PRPs") for this Site are performing the RI/FS pursuant to a Unilateral Administrative Order, U.S. EPA Region 6, CERCLA Docket No. 06-03-10. The PRPs' performance of the RI/FS is authorized by statute and encouraged by EPA policy. Sections 104 and 122 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), provide PRPs with the opportunity to conduct the RI/FS at Superfund sites. In addition, the EPA has repeatedly committed to ensure that those who are responsible for a hazardous waste site conduct the RI/FS at that Superfund site wherever appropriate. "Promoting Enforcement First for Remedial Investigation/Feasibility Studies at Superfund Sites," (OSWER 9200.2-109, March 20, 2012); "Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS)," OSWER 9355.2-21, August 9, 2005). The EPA's experience has shown that, with adequate oversight, the PRPs can perform acceptable RI/FSs, and the EPA continues to perform oversight of the work performed by the Site PRPs and their consultants. In addition, the EPA is partnering with a number of other agencies to assist in performance of this oversight. The partner agencies include the Texas Commission on Environmental Quality ("TCEQ"), Harris County, and the Port of Houston Authority. Oversight has included review and comment on draft sampling plans and final technical deliverables, with draft plans and reports being revised as necessary based on the comments received and issues identified by the various agencies. Oversight also has included plans for additional sampling at the Site by the PRPs, as detailed in my August 14, 2015 letter to you.

The PRPs at the San Jacinto site, like PRPs at many Superfund sites, have a preferred method for addressing the site contamination, as evidenced in the information you obtained during discovery in Harris County's lawsuit. Oversight of the RI/FS, however, is designed to prevent the PRPs' preferences from resulting in undue influence or bias on Agency actions or decision-making. While the PRPs may advocate for the removal action completed in 2011 to be a permanent remedy for the Site, the EPA consistently has made it very clear to all parties that the 2011 cap was a temporary action to stabilize the pits and prevent releases while the alternatives for a permanent remedy are evaluated, and a permanent remedy ultimately selected. For instance, in the comments collected and provided by EPA on the first draft of the site Feasibility Study, EPA made it clear that the PRPs could not identify a recommended remedial alternative in the Feasibility Study, and required the PRPs to provide both a more balanced discussion of the different alternatives and identify additional alternatives for consideration. The RI/FS is only acceptable if the EPA determines it to be so.

While we understand your concern that the PRPs have, and apparently have had for some time, a preferred remedial alternative, the PRPs do not select the remedial action for the Site. At the end of the RI/FS process, the EPA will select a protective remedy for the Site based on consideration of the nine CERCLA criteria as required by law. This selection will be made in consultation with the TCEQ and Natural Resource Trustees, and in consideration of public comments received on the proposed remedial action.

Regarding potential conflicts of interest, the PRPs are using consultants in the performance of the RI/FS for the Site pursuant to the terms of the UAO. The EPA position regarding conflicts of interest on the part of consultants for PRPs is included in "Revisions to the Interim Guidance on PRP Participation in Remedial Investigations and Feasibility Studies," OSWER 9835.2A, February 7, 1989, page A-15, cited in your letter. This guidance provides that, "[a]ny consultants having current EPA assignments as prime contractors or as subcontractors must obtain approval from their EPA Contract Officers before performing work for PRPs." The guidance addresses a consultant's potential conflict of interest regarding work for both the EPA and the PRPs, not the contractors' performance of multiple roles for the PRPs. We are not aware of a prohibition against a PRP's technical consultant in similar circumstances also acting as a litigation consultant for that same PRP. As discussed above, EPA has evaluated the work performed by PRPs at Superfund sites, and, while understanding that any consultant hired by a PRP cannot be expected to be independent of the PRP paying for their work, EPA has determined that PRPs provide acceptable RI/FSs as long as there is regulatory oversight.

As part of EPA's oversight, the U.S. Army Corps of Engineers was retained through an interagency agreement to enlist the Corps' technical expertise with complex, contaminated sediment sites, specifically through a review of the draft Feasibility Study prepared by the PRPs for this Site. The focus of the Corps work has been to review modelling performed by the PRPs' contractors, but the Corps also has been asked to address some of the comments submitted to EPA as part of the EPA Remedy Review Board process. The draft report recently prepared by the Corps of Engineers, the Evaluation of the San Jacinto Waste Pits Feasibility Study Remediation Alternatives ("draft Corps Evaluation"), was provided for review and comment to Harris County, the Port of Houston, the State, and the natural resource trustees. We understand from your letter that Harris County is disappointed with the draft Corps Evaluation. However, the draft Corps Evaluation remains a draft, and EPA is in the process of compiling the comments it received from Harris County and others regarding the draft report before revisions and further work, including additional modelling, are undertaken by the Corps. In your letter, you identified specific concerns Harris County has with the draft Corps Evaluation. The review and comment process is designed to try to address these kind of concerns.

The Region stated previously that it would seek to obtain copies of communications with the laboratories performing sample analysis for the Site pursuant to the terms of the Unilateral Administrative Order and the Administrative Order on Consent for Removal Action. At this point, the EPA does not believe that the allegations presented by Harris County justify attempts by the Agency to force disclosure of thousands of additional documents for which privilege has been claimed.

Finally, the EPA does not agree that there is a conspiracy to subvert the RI/FS at this Site, merely sustained attempts by the PRPs to advocate for their preferred remedy. The EPA continues to believe that the CERCLA program has sufficient safeguards to prevent the remedy selection process from being unduly or inappropriately influenced by the PRPs' advocacy. While the EPA does not intend to recommend this matter to the Inspector General, it is Harris County's decision as to whether it intends to pursue its allegations.

I look forward to meeting with you in the near future. Gary Miller, the Site Remedial Project Manager, has suggested dates for a meeting to Mr. Rock Owens of your staff, and hopefully arrangements for the meeting will be finalized soon.

Sincerely,

Carl Edlund, Director
Superfund Division